In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 807

EWELL LEE DANIELLY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA and THE SUPREME COURT OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California,
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Ewell Lee Danielly for a writ of certiorari to the Supreme Court of the State of California, respectfully shows:

STATEMENT OF THE CASE AND OF THE MATTER INVOLVED.

Ewell Lee Danielly, petitioner, was charged in an information filed by the District Attorney of the City and County of San Francisco, California, with the crime of murder (of his wife Betty Danielly), and with the crime of assault with intent to commit murder (of Elva Sam). Both offenses were alleged to have been committed on October 12, 1946, at San Francisco. Danielly entered pleas of "Not Guilty" and "Not Guilty by reason of Insanity". He was first tried on the general issue, the "Not Guilty" plea, in a bifurcated trial occasioned by the two pleas. On that first phase of the trial, the jury found him guilty of murder of the first degree, with the death penalty, and also guilty of assault with intent to commit murder. The same jury tried the petitioner on the second phase of the trial ("Not Guilty by reason of Insanity" plea), and disagreed. Petitioner was thereafter retried, and the new jury found a verdict that he was "sane" at the time of the commission of the acts, and thereby confirmed the "Guilty" verdicts rendered by the first jury.

Motions for a new trial and in arrest of judgment were denied, and petitioner was sentenced to execution. He duly appealed to the Supreme Court of California, on grounds, amongst others: The trial court denied the defendant due process of law within the meaning of the Fourteenth Amendment to the United States Constitution, in this: He was not permitted to fully defend, at the first phase of the trial on the

general issue, against the charge of murder, in this, he was not permitted by the trial court's erroneous adverse rulings, to disprove the all essential elements of murder and especially first degree murder, namely, premeditation, and malice aforethought, and clear intent to kill.

Respondent Supreme Court of California on January 25, 1949, rendered its decision and filed an opinion affirming the judgments and sentences, wherein three of the honorable seven Justices, Mr. Justice Edmonds, Mr. Justice Carter and Mr. Justice Traynor dissented, and wherein Edmonds, J. and Carter, J. wrote dissenting opinions.

Petitioner within due time sought a rehearing, which was denied by the Supreme Court of California, three of the Justices, Edmonds, J., Carter, J., and Traynor, J., voting for a rehearing.

The judgment of the Supreme Court became final on February 24, 1949; the *remittitur* went down to the lower court and petitioner was resentenced to execution at San Quentin state prison on June 3, 1949.

The homicide occurred in San Francisco about 12:30 a. m. October 13, 1946. Danielly, who was then employed at the Letterman Hospital, Presidio, San Francisco, as a cook, had been in the United States naval service for many years preceding his honorable and medical discharge on account of wounds he received while in action in the Mediterranean Sea during the last world war. He was injured physically and *mentally,* by being hurled about twelve feet against a bulk-

head when an antipersonnel bomb hit his boat. Fragments of the shrapnel bomb entered his body, and still remain there. His physical and mental condition is pictured in the evidence furnished by the Judge Advocate General of the United States Navy, which evidence, containing reports compiled at the various hospitals, was admitted in evidence at the second phase of his trial, on the sanity issue. *He became a man possessed of an unsound mind.*

The deceased was Betty Danielly, his wife. She had obtained an interlocutory decree of divorce early in 1946. The final judgment of divorce would not have been decreed until 1947. After the divorce trial, she went to New York, where she remained until October 1, 1946, and then returned to San Francisco. During the summer of 1946, the petitioner went to New York, and there lived with his wife about a week, and they then agreed to have the divorce decree set aside on her return to San Francisco. She returned in October, and they were frequently together, but did not actually live together nor did they have the divorce decree set aside.

Around midnight, October 12, 1946, and after petitioner had had a telephone conversation with his wife, he drove his car from the proximity of his rooming house to Pine street, several blocks away, and parked it opposite his wife's home. When she emerged from her house with Elva Sam and two male companions, the petitioner walked across the street from his car, and shot and killed his wife after she entered the car

of one of their male companions. He then shot Elva Sam, who has recovered, and then walked away from the *locus delicti*, and waved passing motorists on their way, and went on to his rooming house and went to bed, where he was arrested several hours later.

Danielly claimed he did not do the shooting—that he was in his room and abed all that evening and night. That claim was made because he had no recollection of what had happened, he had been in a state of amnesia. He had suffered such spells of amnesia theretofore. On the night of the homicide, he had no recollection of being in a tavern near his rooming house, and talking with one of the defense witnesses who noticed his strange and unusual demeanor.

Danielly had an unsound mind. It was proven at the trials on the sanity pleas, but was not permitted to be proved on the trial of the general issue.

The defendant, your petitioner herein, had no defense to the charge of murder, except the introduction of evidence to dispel malice aforethought, premeditation and clear intent to kill, the all essential elements of murder, when he was tried on the general issue. He sought to introduce evidence to dispel the elements of murder but was not allowed by the trial court to do so. Such evidence was proffered to prove the homicide was a manslaughter and not a murder, and therefore as a complete defense against the charge of murder. (The defense of insanity could only be shown at a second phase of the trial, in accord with the laws of California, and the rulings of the Supreme

Court of California, on the issue raised by his plea of Not Guilty by reason of Insanity.)

The testimony, offered to dispel malice and premeditation and as a defense to murder, and not to prove insanity, and which was disallowed, is quoted from the record, namely:

Jack Le Velle, technical sergeant United States Army, Letterman Hospital, Presidio, San Francisco, testified: I have known defendant about a year, at Letterman Hospital, where Danielly was cooking. I had charge or supervision of him about six months ago. I knew him during 1946 and up until October 12, 1946. (Record, p. 381.)

Q. Will you describe his actions?

A. He was a conscientious worker, a good worker. (Answer stricken by Court on ground of immateriality.)

A. He is a good worker, only he is a little bit unstable. (Answer stricken by Court.)

Mr. Spagnoli: Q. His actions relative to his temper?

A. Well, he couldn't stand any pressure. (Objection by District Attorney, sustained by Court.)

Mr. Spagnoli: Well, will you state whether or not he was highstrung? (Same objection by District Attorney, same ruling sustaining objection.) (Record, p. 382.)

Mr. Spagnoli: We offer to prove by this witness at this time that he is an intimate acquaintance of the defendant, Ewell Lee Danielly; he observed him frequently, almost daily, I suppose while he was under

his supervision at the Letterman Hospital. We offer to prove further by the witness that Danielly was of a temperamental mood, highly unstable, highly emotional.

The Court: All of which is incompetent, irrelevant and immaterial, and *has no place in this trial.* You are entitled to use this witness to testify to anything that is material and relevant to the issues involved in this case, or also to testify as to his character. But outside of that, all else is immaterial.

Mr. Spagnoli: Your Honor, this does not go to the question of sanity. I don't intend to go that far with it.

The Court: I know what you intend to do or how far you intend to go. Now, the Court has ruled. The objection is sustained. The Court does not desire any further argument on the point.

Mr. Spagnoli: Q. Well, did Danielly, while he was cooking in the kitchen at Letterman Hospital, at any time, throw dishes all over, and pans?

Mr. Mullins (District Attorney): Same objection.

The Court: Same ruling. (Record, p. 383.)

Mr. Spagnoli: Q. As time went by, sergeant, did you notice whether or not he became of a more depressive mood? (Same objection, same ruling.) * * *

Mr. Spagnoli: Well, we have no further questions, in view of the Court's rulings.

The Court: Very well, any cross-examination?

Mr. Mullins: No questions. (Record, p. 384.)

Walter A. Yohe, sergeant, Letterman Hospital, Presidio, San Francisco: Testified he has known defendant since May of 1946—knew him continuously until October 12, 1946, and saw him that day; that Danielly was employed at the hospital as a civilian cook.

"I was in charge of all civilian personnel there. He worked directly under me. I assigned him to his duties, his place of duty * * *" (Record, p. 386.)

Q. Can you describe his actions on October 12, 1946?

Mr. Mullins: I object to that on the ground it is indefinite, incompetent, irrelevant and immaterial.

Mr. Spagnoli: All for the purpose of showing his state of mind at that time, with reference to whether or not he acted in a heat of passion when he shot and killed his wife, if he did do so, your Honor.

The Court: The objection will be sustained.

Mr. Spagnoli: Well, of course, this witness was produced, your Honor—we are making the offer of proof by putting the witness on the stand, and, without repeating the questions I asked the other witness, might they be considered as having been propounded to this witness?

The Court: Yes. Let the record so note, that the same questions as have been propounded to the previous witness would be propounded to this witness, and the same rulings would be made by the Court.

Mr. Spagnoli: Of course, I have to bow to the Court's ruling, but at the same time I have to properly present the record.

The Court: Yes, proceed with the next question.

Mr. Spagnoli: With regard to my offer of proof that I made with regard to Sergeant Le Velle, it goes also for this witness, the same offer of proof.

The Court: All right. It will be so noted. Same ruling.

Mr. Spagnoli: Q. Did you see him frequently during the time he worked there under your supervision? (Record, p. 386.)

A. At least once or twice every day, sir.

Q. You are still stationed at the Letterman Hospital, are you not?

A. Yes, I am, sir.

Mr. Spagnoli: In view of the Court's ruling, we have nothing further to ask this witness.

The Court: Very well. Any cross-examination?

Mr. Mullins: No questions. (Record, p. 387.)

Another witness was *Jack J. Black.* (His testimony starts at Record p. 400.)

Black testified that he has known Danielly since 1934 when they were in a training station together. Saw him frequently ever since; they got out of the service practically the same time; is an intimate acquaintance of Danielly. Knew defendant and his wife Betty Danielly since their marriage; saw them frequently. Saw her after she returned to San Francisco from New York around October 1, 1946. (Record, pp. 400, 401.) Saw her in Danielly's company, in October, 1946 before she met her death. Saw them

in Jack's Tavern, on Sutter street, where they were drinking, and he sat there, had a drink with them, and conversed with them.

Q. (By Mr. Spagnoli): What was the topic of conversation, generally?

A. Well, the topic of conversation was— (Record, p. 402.)

Mr. Mullins (the prosecutor): I object to this as incompetent, irrelevant and immaterial, hearsay, it is not part of any of the issues of this case.

The Court: Yes.

Mr. Spagnoli: I think it is. I can explain, before your Honor rules. As stated in my opening statement, we intend to show that the defendant here had great affection and love for his wife; that despite the fact she divorced him in February of 1946, and the divorce wasn't final, that they met up in New York, and agreed to go back together again, and announced it to some of their friends in San Francisco, this being one of the persons that the announcement was made to. This is for the purpose of showing that they bore a friendly attitude towards each other, a loving attitude, a loving disposition,—and to negative any malice that might be presumed in connection with any shooting, if Danielly did the shooting.

Mr. Mullins: The further objection the testimony is self-serving.

The Court: The objection will be sustained.

The witness then testified he was with Danielly and his wife about 10 or 15 minutes or so (on the occasion mentioned) and that they seemed to be friendly. (Rec-

ord, pp. 403-4.) That they did tell him they had made up with each other and were going back to live with each other as man and wife.

Q. Did either of them tell you that they had made up with each other and going back to live with each other as man and wife?

A. Yes, they did.

Q. Which one said it?

A. Well, it was understood they made up in New York, while they was in New York, they were together. And they say they decided to try it over again. Which, by me being a friend of both of them, I was happy for them. (Record, p. 404.)

Witness then stated it was the first time he met Mrs. Danielly after she had left San Francisco, and returned; that he met them by chance.

Mr. Spagnoli: In view of the Court's rulings, of course, I intend to ask this witness, but it is not necessary, some of the same questions I asked the sergeants. But I might renew that over again with this witness, if your Honor please, to show the defendant's state of mind on the 12th of October, 1946, with reference to whether or not there could have existed any malice aforethought in connection with any shooting.

The Court: Same rulings. If the questions were the same, the rulings would be the same.

Mr. Spagnoli: Just a second. Well, that is all at this time.

On cross-examination: Have known Danielly and wife intimately since 1934; during Danielly's divorce he lived at my home; while the divorce case was pend-

ing they both had dinner at my home; the time referred to is the only time I met them since she returned from New York. He was living on Eddy street and she was living on Pine street.

Mr. Mullins: Q. Now, in this conversation that you said they had in your presence, you stated they had become reconciled in New York, is that right?

A. Well, that is what told me by her.

Q. Did they say they had set aside the interlocutory decree of divorce that had been secured?

A. The only thing she say, "We decided to try it over again," that's all.

Q. She said they decided to do that in New York?

A. Yes.

Mr. Spagnoli, on redirect: Q. What do you do for a living?

A. I am a government civil service police officer.

Dr. M. B. Mooslin testified he is a physician and surgeon, educated in the University of Pennsylvania, has been in practice since 1902 and in San Francisco 45 years; that he knows the defendant Ewell Lee Danielly. Met him June 15, 1945; he was one of his patients.

Q. (By Mr. Spagnoli): Did you treat him for nervous disability?

A. Yes, sir.

Mr. Mullins (prosecutor): I object to that on the grounds it is incompetent, irrelevant and immaterial, got nothing to do with any of the issues of this case.

Mr. Spagnoli: It is for the purpose, if your Honor please, of dispelling any malice aforethought in a murder charge laid in the indictment in this case, and to reduce the homicide, which we claim only amounts to nothing more than manslaughter.

The Court: The objection will be sustained.

Mr. Spagnoli: All right.

Q. How frequently, Doctor Mooslin, have you seen the defendant Danielly in your professional capacity?

A. About three times.

Q. About three times. And have you formed any opinion, Doctor Mooslin, as to his sanity or insanity?

Mr. Mullins: Just a minute. I object to that, your Honor, please, on the grounds that the Court has admonished counsel time after time, both on the *voir dire* examination of these veniremen, and throughout the trial, so that there was no question whatsoever about it, that the sanity or insanity of the defendant is no part of the issues of this trial, and I ask he be instructed to desist from further questioning along that line, on that ground.

The Court: The objection will be sustained.

Mr. Spagnoli: Q. Doctor Mooslin, without regard to the defendant's sanity or insanity, will you answer this question, whether or not in your opinion the defendant Ewell Lee Danielly is of a highly emotional character?

Mr. Mullins: The same objection.

The Court: The same ruling.

Mr. Spagnoli: Q. Will you state, Doctor Mooslin—it might be a little leading, my last question—will you state his condition, without reference now to

his sanity or insanity. (Objected to on same ground; objection sustained.)

Mr. Spagnoli: Q. Did you prescribe medicine in the course of your professional capacity for the defendant Ewell Lee Danielly?

Mr. Mullins: I object on the ground it is incompetent, irrelevant and immaterial.

A. After all, he was my patient.

The Court: The objection will be sustained.

Mr. Spagnoli: We offer to prove at this time, if your Honor please—of course, this is not testimony—we offer to make this proof by this doctor, that he did prescribe medicine for the defendant.

The Court: Well, the objections to those questions have all been sustained. There is no need of making any further statement concerning them. If you have a further question, you may proceed to ask the question.

Mr. Spagnoli: Of course, it is a follow-up question to the one the Court sustained, but nevertheless, the record does not show what I am aiming at. And it is not done in defiance of your Honor's ruling by any means.

Q. Did you, in the course of your treatment, prescribe medicine which was for nervous disability?

Mr. Mullins: I object on the same ground.

The Court: Same ruling, the objection will be sustained.

Mr. Spagnoli: In view of the Court's ruling, we have no further questions to ask of Doctor Mooslin.

(No cross-examination had.) (Record, pp. 419-423.)

Other witnesses, including the defendant, were not permitted to testify to matters to dispel malice aforethought and premeditation. Danielly, the defendant, was not allowed to testify that he had been wounded while in the service of his country, that he was confined in hospitals, and was awarded a disability pension. (Record, pp. 416-418.) He was not allowed to tell what he was treated for at San Leandro Naval Hospital (resulting in his medical discharge from the United States Navy); or that he was treated by his doctor, Dr. Mooslin, or that he was under the care of a psychiatrist. (Record, pp. 443-4.) Nor was he permitted to testify he was under gunfire in the Navy (p. 447); that his body still contained fragments of a shrapnel bomb—all going to his physical and mental condition (p. 448), and to prove his highly emotional qualities and nervousness, and thereby account for his heat of passion when he committed the homicide, and thereby prove the homicide was a manslaughter and not a murder. He was not permitted to show a telegram his wife had sent him from New York arranging their meeting there (which had a bearing on the love and affection they bore towards each other—and dispelling malice and premeditation). (Record, p. 453.)

The trial court would not allow him to show his association with his wife while in New York in June, 1946 (Record, pp. 454-4-5-) and that they had become reconciled. Nor allow him to introduce letters his wife had written to him (Record, pp. 457-8 *et seq.*), nor to testify that they had agreed to set aside the divorce

decree (p. 460), nor to testify and answer the question, "Did you have love and deep affection for her" (pp. 464-5)—all whereof went to the question of motive, malice and intent, and in the proper defense of a murder charge. Defendant furthermore was not allowed to show he was in a state of amnesia when he shot his wife, and why it was that amnesia existed (pp. 461-2), nor to show or explain what he attributed his condition to, and why his memory does not serve him as to what happened October 12th when his wife met her death (p. 484). We were not permitted to introduce, as proof of the fact the defendant and his wife became reconciled, a few months before the homicide, a picture of the two of them taken in New York (pp. 485-6).

Witnesses Mrs. Deville and Mrs. Horton were not allowed to testify as to the love and affection defendant bore towards his wife and to show there had been a complete reconciliation (pp. 430-436). And all for the purpose as defendant's counsel stated: "This destroys any motive, any malice aforethought—that is the purpose of it. We are defending a murder charge."

It is because of the erroneous rulings of the trial court and the wrongful and erroneous exclusion of pertinent, legal and proper defensive evidence, that Danielly was deprived of fully defending against the charge of murder, and was convicted in violation of the due process of law clause of the Fourteenth Amendment to the United States Constitution.

The action of the majority of the respondent Court in affirming the conviction was in direct conflict with the decisions of this Court and decisions of the respondent Court and courts throughout the land, holding that an accused person may not defend against a criminal charge in all legal and proper ways.

JURISDICTIONAL STATEMENTS.

1. The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended (28 U.S.C.A. section 347).

2. The decision and judgment of respondent Court was rendered on January 25, 1949 and became final February 24, 1949.

3. The basis upon which it is contended that the Supreme Court of the United States has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

Where the decision of respondent Court is in conflict with applicable decisions of this Court, and where denial of due process of law is had, this Court has jurisdiction on *certiorari* to review the action of the respondent Court.

See:

Rules of the Supreme Court, Rule 38, subsection 38, 5(b);

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 253; 85 L. Ed. 1313, 1315;

Ansaldo San Giorgio I v. Rhenstrom Bros. Co., 294 U.S. 494, 495-6, 79 L. Ed. 1019;
Starr v. U. S., 153 U.S. 614, 38 L. Ed. 841;
Ruhlin v. New York Life Ins. Co., 304 U.S. 203, 204-205, 82 L. Ed. 1292;
Triplett v. Lowell, 297 U.S. 638, 644, 80 L. Ed. 953;
Burtnett v. U. S. (C.C.A., 10th), 62 Fed. (2d) 452, 456;
Stures v. U. S. (C.C.A. 3rd), 57 Fed. (2d) 90, 92;
Ward v. U. S. (C.C.A., 9th), 4 Fed. (2d) 772, 773;
Pincolini v. U. S. (C.C.A., 9th), 295 Fed. 468, 470;
Jackson v. U. S., 48 App. D.C. 272, 277, 278.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

(1) The trial court erred, and denied the petitioner due process of law by the exclusion of evidence designed (a) to dispel malice aforethought, premeditation and clear intent to take life, and (b) designed to prove the homicide was not a murder but a manslaughter.

(2) The action of the respondent Court in affirming the conviction was in conflict with comparable decisions of this Court, respondent Court, and other courts throughout the land.

REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

It is petitioner's contention:

First: That in excluding the proffered testimony to dispel malice aforethought, premeditation, and clear intent to kill, the trial court erroneously barred the petitioner from defending, at the phase of the trial on the "Not Guilty" plea by such means as he had, the charge of murder—and thereby violated the Fourteenth Amendment to the United States Constitution, and, regardless of the fact that the petitioner had also pleaded Not Guilty by reason of Insanity, and thereby had a separate and distinct defense.

Second: That the opinion of the majority respondent Court, in affirming the judgment, ignored the fact that the defendant, petitioner herein, had been denied due process of law—which fact, of denial of due process is ably discussed in Mr. Justice Edmonds' dissenting opinion, and concurred in by Mr. Justice Carter and Mr. Justice Traynor, and in the separate dissenting opinion of Mr. Justice Carter.

For the reasons herein stated petitioner respectfully prays that this honorable Court issue a Writ of Certiorari to the People of the State of California and the Supreme Court of California, to the end that the questions involved may be fully presented and argued and justice be done in the premises.

Dated, San Francisco, California,
May 5, 1949.

Respectfully submitted,
ERNEST SPAGNOLI,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for petitioner in the above entitled cause and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
May 5, 1949.

ERNEST SPAGNOLI,
Attorney for Petitioner.

In the Supreme Court
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United States

OCTOBER TERM, 1948

No.

EWELL LEE DANIELLY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA and THE SUPREME COURT OF THE STATE OF CALIFORNIA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION AND JUDGMENT OF THE COURT BELOW.

The decision and opinion of the respondent Court, the Supreme Court of California, was rendered and filed on January 25, 1949.

A petition for rehearing was denied by respondent Court, and the judgment of the respondent Court became final on February 24, 1949. (A decision of the Supreme Court becomes final 30 days after filing; Rule 24, Rules on Appeal.)

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended (28 U.S.C.A. sec. 347). And Rule 38½, 28 United States Code, sec. 2101 (c), and section 1251, Original Jurisdiction, (3), and section 1257 (2) and (3) Appendix to Fourth Cumulative Supplement to O'Brien's Manual of Federal Procedure (Third Edition).

The grounds on which the jurisdiction of this Court is invoked are fully set forth in the petition filed herewith under the heading "Jurisdictional Statements", hereby respectfully referred to at page 17 of the petition.

STATEMENT OF THE CASE.

We respectfully refer to "Statement of the Case and Matter Involved" contained at page 2 *et seq.*, in the foregoing petition filed herewith, which sets forth a statement of the case, and the grounds claimed by petitioner whereby he was deprived of due process of law, by not being permitted to fully defend against a charge of murder, namely, the exclusion of proffered evidence that would tend to or would actually dispel malice aforethought, premeditation, and clear intent to take life.

SPECIFICATIONS OF ERRORS RELIED ON.

1. Respondent Court erred in affirming the conviction of petitioner and thereby upholding the trial court's action in disallowing proper and pertinent and legal proof as a defense to a murder charge (not offered to prove insanity),—which proof would have dispelled malice and premeditation and clear intent to take life, the all essential elements of first degree murder.

2. The action of respondent Court in affirming the conviction is in conflict with comparable decisions of this Court, respondent Court, and with the United States Constitution, the "due process of law" clause of the Fourteenth Amendment.

3. Denial of the motion for a new trial, ground No. 14 being "Error made by the Court, violative of the defendant's constitutional rights, guaranteed by the United States Constitution, namely, the equal protection of law clause of the Fourteenth Amendment of the Federal Constitution, and other sections and amendments to the Federal Constitution, in this, to-wit: Forbidding the defendant from proving the defendant's state of mind at the time of the commission of the homicide, as a defense to the crime itself, and as a defense to intent." (Record, pp. 1339, 1367, 1390.)

ARGUMENT.

THE TRIAL COURT DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW BY NOT PERMITTING HIM TO FULLY DEFEND AGAINST A MURDER CHARGE, IN THIS: BY EXCLUDING EVIDENCE CALCULATED TO DISPEL MALICE, AND PREMEDITATION AND CLEAR INTENT TO TAKE LIFE. THE RESPONDENT SUPREME COURT OF CALIFORNIA ERRED IN UPHOLDING THE TRIAL COURT'S EXCLUSION OF SUCH EVIDENCE.

The decision of the respondent Supreme Court of California is reported in Advance California Reports, February 1, 1949, 33 A.C. No. 12, p. 336. Four of the seven Justices of that high tribunal affirmed the judgment. Three Justices, Edmonds, J., Traynor, J., and Carter, J., dissented. Mr. Justice Edmonds wrote a dissenting opinion (pp. 356-364), concurred in by Carter, J., and Traynor, J. Mr. Justice Carter also wrote a dissenting opinion. (pp. 364-368.)

We respectfully refer this honorable Supreme Court to the dissenting opinions of Mr. Justice Edmonds and Mr. Justice Carter, concurred in by Mr. Justice Traynor. We would not attempt to write a brief which could more forcefully and clearly show our position in this matter. Edmonds, J., in his opinion, quotes from this honorable Supreme Court of the United States, in its decision in *Hopt v. People,* 104 U.S. 631, 634 (26 L. Ed. 873):

> "But when a statute establishing different degrees of murder require deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premedita-

tion, necessarily becomes a material subject of consideration by the jury."

Mr. Justice Edmonds said, in his dissenting opinion,

"This language is broad enough to include evidence of mental condition in every situation where, for any reason, the defendant is incapable of forming the state of mind requisite for the commission of the crime charged."

The record in the trial of petitioner shows beyond doubt that the defendant possessed an unsound mind. It was our contention that he had a right to show that state of mind—not amounting however to insanity—to dispel malice aforethought, premeditation, and clear intent to kill, the all essential ingredients of murder or first degree murder. And because he was not permitted to so dispel those elements of murder, on the trial of the general issue (on the not guilty plea), he was denied due process of law. The alienists who testified at the phase of the trial on the Not Guilty by reason of Insanity plea, agreed that Danielly possessed an unsound mind. Comparing unsoundness of mind to the mind of a person who voluntarily becomes intoxicated and in accord with the provisions of section 22 of the Penal Code of California—

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the

> fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act,"

we contended and still contend, that such person, with an unsound mind, could not form purpose, motive or intent any more so than a person who voluntarily becomes intoxicated and slays a human being. If an intoxicated person—a person who voluntarily becomes intoxicated—cannot be adjudged guilty of first degree murder, how can a person with an unsound mind be so adjudged? If a defendant can show voluntary intoxication to defeat a first degree murder conviction, should not a person with an unsound mind be accorded the same right?

The Supreme Court of California, in denying a hearing before that tribunal, after the District Court of Appeal of California had affirmed a judgment of conviction in a second degree murder conviction, said:

> "In the matter of the proposed evidence as to voluntary intoxication: The evidence was clearly admissible and its exclusion was error. But the utmost effect of evidence of this nature would have been to exclude the idea of the deliberation and premeditation essential to murder of the first degree, and thus reduce the offense to murder of the second degree. The defendant was found guilty of murder of the second degree only, doubtless because of the evidence of other witnesses tending to show a condition of intoxication. Plainly no prejudice was suffered by defendant by reason of the erroneous ruling." (*People v. Conte,* 17 Cal. App., p. 788.)

Mr. Justice Edmonds' opinion in the instant case (*People v. Danielly*, 33 A.C., at 363), states:

"* * * The effect of the holding, in the majority opinion, as to the sufficiency of the evidence casts the burden of disproving premeditation and other intention upon the defendant, whereas up to the present time a defendant has had only the burden of raising a reasonable doubt as to the essential elements of the crime. (See People v. Cornett, 198 P. 2d 877; People v. Thomas, 25 Cal. 2d 880, 895, 156 P. 2d 7; and concurring opinion of Mr. Justice Traynor in People v. Albertson, 23 Cal. 2d 550, 587, 145 P. 2d 7) * * *"

"Danielly did not attempt to prove affirmatively by the offer of the excluded evidence that he was in a 'heat of passion' at the time of the killing, as is suggested by the majority opinion. His counsel offered evidence to dispel the inferences of malice aforethought, premeditation and deliberation so that only an inference of 'heat of passion' would remain and he would, therefore, not be guilty of more than manslaughter. That evidence certainly 'tends to throw light on a fact in dispute' (People v. Adamson, 27 Cal. 2d 478, 485, 165 P. 2d 3) for it would tend to dispel the inferences of premeditation, deliberation and malice aforethought which might be drawn from the testimony presented by the People." (Italics ours.)

And continuing, Mr. Justice Edmonds well said:

"But even if Danielly were attempting to prove an affirmative defense, the probability of his not being able to do so should not be the basis for excluding evidence in a criminal case * * * *A defendant who, because of mental disorders short*

of insanity, was incapable of premeditating and deliberating upon the commission of a homicide, cannot be guilty of a crime which by definition requires these mental elements. The evidence offered by Danielly concerning his mental status should have been received for the limited purpose of tending to prove whether or not he shot his wife or Elva Sam with either a specific intent or deliberation and premeditation, and the adverse ruling constitutes prejudicial error." (Italics ours.)

"For these reasons, in my opinion, the judgment and the order denying a new trial should be reversed and the cause remanded for a new trial."

Mr. Justice Carter, in his valuable dissenting opinion in the instant case (*People v. Danielly,* 33 A.C. 364), states:

"There can be no doubt that under the rule announced in People v. Wells, 33 A.C. 304, evidence of defendant's mental condition was admissible on the trial of the issue raised by the plea of not guilty * * * The majority opinion here misconstrues the record and is unsound in other respects * * *"

Mr. Justice Carter then says that the proffered proof as to defendant's mental condition, and especially the questions put to Dr. Mooslin,

"is conceded that the object of the questions asked was to dispel 'malice aforethought'. The questions were directed solely at defendant's mental condition—to his emotional and nervous disability. The doctor was never given an opportunity to state the nature of the condition or the effect it had on defendant's mental state. The

questions imply that he had a nervous and emotional instability.

"* * * But the majority opinion erroneously asserts that 'Defendant did not even offer to show the nature of his "nervous disability".' He did all he could in the light of the court's rulings. Defendant is condemned for not showing that which the trial court would not permit him to show * * *"

Mr. Justice Carter's opinion, in the concluding paragraphs, reads:

"On the point of relevancy, the majority seems to find immateriality because the evidence was offered on 'heat of passion' rather than malice and premeditation and that it was not pertinent to that issue. Assuming it was not, viewing the whole record, I do not believe the offer was so limited by defendant's counsel. While he spoke of 'heat of passion' he also referred to malice and frame of mind. But in addition to that, the testimony of Dr. Mooslin was offered *for the specific purpose of dispelling malice and it is so conceded by the majority opinion.* The only answer of the majority opinion as to the relevancy of that evidence is that defendant did not show his nervous and emotional disability affected the absence or presence of malice. How can he be penalized for that when *the trial court prevented him from showing such relevancy by that very witness?* In other words, the majority opinion holds the evidence irrelevant because defendant did not establish its relevancy, and at the same time, approves the action of the trial court in preventing defendant from showing its relevancy. I do not believe

that such reasoning is conducive to the orderly administration of justice."

"It seems crystal clear to me that under the rule announced in *People v. Wells, supra,* the evidence of defendant's mental condition offered on behalf of defendant in this case was admissible on the trial of the issue raised by the plea of not guilty, and that had the trial judge been aware of such rule, he would have permitted the introduction of such evidence. To now hold, as does the majority, that the trial court was justified in excluding such evidence, is, in my opinion, the denial, on purely technical grounds, of the right to present the only defense available in a case of this character. The result of such denial can be nothing short of a miscarriage of justice. I would, therefore, reverse the judgment."

CONCLUSION.

We respectfully submit that the foregoing demonstrates that the decision and opinion of the majority of the respondent Court is erroneous, and in conflict with decisions of this honorable Supreme Court, and that moreover the decision is against the great weight of legal authorities in this country.

Dated, San Francisco, California,
May 5, 1949.

Respectfully submitted,
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